the 14th Amendment, U. S. Constitution, in permitting benefits to be set off, without a monetary evaluation of such benefits being alleged or proved, against damages sustained by the taking of land.

STATEMENT

This case began on March 5, 1959, when appellee's right-of-way agent, Reynolds, went to appellant Cady's office and asked him to sign a conveyance of the land in question (R. 115). No money was offered, nor was appellee prepared to offer money (R. 116). Rather, appellee took the position that "special benefits" in an undisclosed and undetermined amount (R. 117) would take the place of a purchase price for the land.

Appellee, on October 1, 1959, presented its petition for condemnation *ex parte* to the Circuit Court of Livingston County and it was ordered that the petition should be filed, and a hearing was ordered for December 8, 1959 (R. 5).

Among other matters, appellee alleged that:

> "5. Relator cannot agree with the owners of the land, property and rights herein described, upon the proper compensation, *if any,* to be paid therefor." (R. 9; the italicized words are not contained in the statute).

Appellants specifically denied this allegation in their answer (R. 33). They also raised the defense of illegality because of the unconstitutionality of the petition and procedure adopted thereunder (R. 34-35). The court summarily denied appellants' prayer to be discharged under their answer (R. 35). Thereupon, the court appointed commissioners (R. 36-38), and the commissioners filed a report (R. 39-42), concluding as follows:

"NO Dollars ($NO) is assessed by the commissioners as the net damages for the appropriation of the above." (R. 42).

On December 18, 1959, appellants filed their Motion for Trial, Alternative Motion for New Trial, and Exceptions to Commissioners' Report (R. 60-61). No relief under the motions was granted by the court so appellants perfected their appeal to the Missouri Supreme Court (R. 62-63).

Appellants briefed and argued the constitutional points raised by their pleading (see Appendix C), but the court dismissed (R. 61, Appendix A).

Upon further proceedings in the trial court, appellants reiterated their position on the constitutional issues (R. 67-68). Motion for new trial incorporated the constitutional questions (R. 87-89), and such motion was sustained by the trial court and affirmed on appeal (Appendix A). On the new trial, appellants again orally argued the constitutional issues (R. 119-121). After another commissioners' report was filed, appellants filed exceptions, noting their continued assertion of the constitutional points previously raised (R. 130).

The final trial revealed another method of injecting "special benefits" rather indirectly in the case. Appellants' position is noted by the following quotation from their argument in their brief on appeal:

"Plaintiff's (appellee's) counsel, in concluding his opening statement, stated that he believed the jury would be instructed on the doctrine of special benefits (R. 143-144), to which defendants (appellants) objected. The court overruled the objection, not realizing that plaintiff (appellee) would decline to offer any instruction whatsoever in the case. This stratagem of plaintiff (appellee) smacks of that held improper in

Cade v. *Atchison, T. & S. F. Ry. Co.*, 364 Mo. 620, 265 S.W. 2d 366 (1954). It was a designed effort to persuade the jury to use the special benefits doctrine without risking an affirmative instruction on the doctrine, which plaintiff (appellee) realized the defendants (appellants) had and would continue to argue against as being unconstitutional."

Appellants' motion for new trial again set out the constitutional points (R. 174-176), and again these points were briefed and argued on appeal (Appendix C). The court's opinion clearly demonstrates the rejection of the constitutional points raised (Appendix A).

THE QUESTIONS ARE SUBSTANTIAL

It is a historical fact that colonies had been taking land for road purposes without the payment of money to owners. To prevent this practice, the bill of credit prohibition was inserted in the Constitution. This prohibition goes to the very heart of constitutional limitations. Story, 2 COMMENTARIES ON THE CONSTITUTION 1851 ed., expressed it:

> "The prohibition . . . cannot, perhaps, be more forcibly vindicated, than by quoting the glowing language of the Federalist, a language justified by that of almost every contemporary writer, and attested in its truth by facts, from which the mind involuntarily turns away at once with disgust and indignation (See THE FEDERALIST, No. 44) (at 205).
>
> * * * The object of the prohibition was not to prohibit the thing when it bore a particular name; but to prohibit the thing, whatever form or name it might assume. * * * It can never be seriously contended, that the constitution means to prohibit names, and not things; to deal with shadows, and to leave substances. * * * The prohibition is general: it extends to all bills of credit, not to bills of a particular description." (at 211-212).

This was the prohibition clearly analyzed by Marshall in *Craig* v. *Missouri*, 4 Peters 410. See 4 BEVERIDGE, THE LIFE OF JOHN MARSHALL, 510-512.

The evil sought to be prohibited—a state's issuance of something other than legal tender, as defined constitutionally, in payment of obligations—is all too apparent.

Both *Craig* and *Briscoe* v. *Kentucky Bank*, 11 Peters 318, support appellants' position: commissioners' reports are issued by the state, on the authority of the state, and forced to circulate—from the state to the landowners—in payment for land taken from the property owner.

As Cooley stated, 2 CONSTITUTIONAL LIMITATIONS, 8th ed., 1927, at 1201, "this compensation must be pecuniary in its character, because it is in the nature of a payment for a compulsory purchase." (footnoting to the proposition: the effect of the right of eminent domain against the individual—a right which a magnanimous and just government will never exercise without amply indemnifying the individual—amounts to nothing more than a power to oblige him to sell and convey when the public necessities require it.)

Madison succinctly phrased it: "The extension of the prohibition to bills of credit must give pleasure to every citizen in proportion in his love of justice, and his knowledge of the true springs of public prosperity." (THE FEDERALIST, No. 44).

Mr. Justice Black has cogently demonstrated the absolute nature of the just compensation provision of the Fifth Amendment. Chapter 3 in THE GREAT RIGHTS (ed. Cahn) at 57 et seq. Appellants submit that *Griswold* v. *Connecticut*, 381 U.S. 479, certainly carries this absolute protection against the states. The illustration selected by Mr. Justice Black posed a dilemma in which the government had

no money to pay for vitally needed land in a great national emergency. In the case at bar, the state highway commission had no money to purchase land from appellants and so it sent out its right-of-way man, Reynolds, with "special benefits" in undisclosed and undetermined amounts to "stand in" for money. Appellants' position throughout has been that this effort of the state to pay for land with something other than money amounts to the issuance of a bill of credit, viewed in the plain economics of the situation.

When the state condemnation procedure permits the state by fiat to issue a credit instrument, whether designated a "commissioners' report" or "jury verdict" as a substitute for money, the basic economic effect is the same: the state is issuing something other than money to pay for an obligation payable in money, *i.e.*, a bill of credit.

CONCLUSION

The questions presented by this appeal are substantial and of broad public importance. Probable jurisdiction should therefore be noted.

Respectfully submitted,

ELWYN L. CADY, JR.
531 Altman Building
103 Petticoat Lane
Kansas City, Missouri 64106
324 Bellevista Drive
Independence, Missouri 64050
Counsel for Appellants.

APPENDIX A

STATE of Missouri ex rel. STATE HIGHWAY COMMISSION of Missouri,

Plaintiff-Respondent,

v.

Elwyn Loomis CADY and Annabel Cady,
Defendants-Appellants.

No. 24344.

Kansas City Court of Appeals.
Missouri.
Dec. 6, 1965

Motion for Rehearing and or Transfer to Supreme Court Denied Feb. 7, 1966.
Application to Transfer Denied April 11, 1966.

SPERRY, Commissioner.

Plaintiff instituted this suit for the purpose of condemning certain of defendants' real estate for highway construction. Condemnation of something over an aere was adjudged for right of way, and of a tract for an easement for drainage construction, was adjudged. No buildings were taken or damaged. The total land affected was two and eighty-three hundredths acres, according to the court's instructions. From a jury verdict, and judgment thereon in the amount of $150.00, defendants have appealed.

This is the second appeal in this case. State ex rel. State Highway Commission v. Cady, Mo.App., 372 S.W.2d 639. This appeal was originally lodged in the Supreme Court but was transferred to us on the grounds that such

court lacked jurisdiction. The original briefs in the Supreme Court are re-filed here. The contents thereof are largely devoted to constitutional and other questions relating to jurisdiction. Such questions are not pertinent to a final disposition of this appeal.

The record shows that, after the final judgment of this court in the first appeal had gone down, the Circuit Court conducted a hearing to determine the jurisdictional fact of whether negotiations were had, between plaintiff and defendants, in an effort to agree on the amount of damages to be paid for the taking of land and rights of defendants, prior to the institution of condemnation proceedings. From evidence before the court the judge found that such negotiations had occurred but that no agreement could be reached. (It appeared that plaintiff contended, during such negotiations, that defendants' benefits, from the proposed highway improvements, exceeded their damages, and refused to offer any cash payment for damages; and that defendants refused to agree to that proposal).

Thereafter, the court appointed Commissioners to assess damages. Damages assessed amounted to $100.00. Defendants excepted to the report of the Commissioners and the cause was tried to a jury. Defendants offered in evidence a quit claim deed whereby a consolidated school district conveyed an acre of land out of a corner of the tract here involved, adjacent to the land condemned, and rested. The recited consideration therefor was $2,800.00.

Plaintiff produced two witnesses on the issue of damages. Mr. Slattery, a landowner in the vicinity and a former tenant of the property involved, stated that he was familiar with the road construction and with the property prior to construction; that the part taken for right of

way was an old fence row bordering the former township road; that construction of the state highway and of the drainage improvement increased the value of the remaining tract; that the land actually taken was worth from $15.00 to $20.00 per acre prior to the taking; and that drainage from this tract had been a problem prior to construction of the drainage improvement.

Mr. Cristison is a landowner of the area. He was familiar with this land and had combined grain on it. He stated that this improved highway replaced a narrow, rough and bumpy township road over which it was difficult to operate farm equipment; that the drainage was bad and caused flooding of the ditch under a culvert, washing it out; that he appraised the farm, prior to the taking, at $150.00 per acre; that its value was increased by from $10.00 to $15.00 per acre, by reason of the improvement. He stated that the land transferred to the school district was better located and more valuable than that taken in this proceeding, and that there was a building on it. It appears that defendants' evidence regarding the deed would be of little value in arriving at the damages suffered by defendants by reason of the taking *here* involved.

[1] Defendants complain that there is no proof of the jurisdictional fact of negotiations between the parties in an attempt to reach an agreement on the amount of damages due defendants prior to institution of this action and appointment of Commissioners. In State ex rel. v. Cady, supra, we hold that such negotiations must precede the filing of condemnation proceedings. When this case was again heard below, evidence of an attempt by plaintiff to procure an agreement on damages was offered and the court held such attempt to negotiate sufficient to comply with this requirement. This occurred before other orders were made. We approve that ruling.

[2, 3] It is next contended that the court should have disapproved and set aside the report of the Commissioners because of failure of the Commissioners to find and allow damages to be paid *in cash money*. The filing of exceptions to the report and the order granting a jury trial resulted in setting aside the report. It was then as though no report had even been made. School District of Kansas City v. Phoenix Land & Improvement Co., 315 Mo. 775, 287 S.W. 621, 622; State ex rel. State Highway Commission v. Deutschman, 346 Mo. 755, 142 S.W.2d 1025, 1028. Furthermore, the Commissioners found and reported damages in the amount of $100.00. This is less than defendants believe they are entitled to receive, but it does not amount to an illegal taking of private property without just compensation, as a matter of law. The jury, after a *full* hearing, allowed only $150.00.

[4-6] Error is predicated on the action of the court in permitting counsel for plaintiff to say, in his opening statement, that there would be evidence to the effect that the tract involved was of a greater market value *after* the taking than it was *prior* thereto, and that, as a consequence, defendants were not entitled to receive any damages for the taking. The measure of damages to which defendants are entitled is the difference between the fair reasonable market value of the tract remaining after the taking, and the fair market value of the whole tract prior thereto. State ex rel. v. Ridgway, our docket number 24357, opinion handed down concurrently herewith. It is proper for the jury to take into consideration the benefits accruing to the land involved in arriving at the damages due defendants. Sec. 227.120, RSMo 1959, V.A.M.S.; Newby v. Platte County, 25 Mo. 258. It was not improper for that issue to be argued by plaintiff, on the evidence and the law. Baughman v. Metropolitan St. Ry. Co., Mo.App., 177 S.W. 800.

[7] Defendants complain that the jury, in assessing damages, took into consideration special benefits accruing to defendants although this issue was not submitted in the single verdict directing instruction given in the case. In that respect the instruction unduly favored defendants. However, we have no way of determining whether or not the issue played any part in the jury's ultimate decision. There was testimony to the effect that the *value of the land taken* (2.83) acres, prior to its taking, was from $15.00 to $20.00 per acre. There was also testimony to the effect that the whole farm was increased in value, by construction of the road and drainage improvement, at least $10.00 per acre.

No error materially affecting the merits of the case appears. The judgment is affirmed.

MAUGHMER, C., concurs.

PER CURIAM:

The foregoing opinion of SPERRY, C., is adopted as the opinion of the court

CROSS, P. J., HOWARD, J., and FRANK HAYES, Special Judge, concur.

BLAIR, J., not participating.

STATE of Missouri ex rel. STATE HIGHWAY COMMISSION of Missouri,
Plaintiff-Appellant,

v.

Elwyn Loomis CADY, Annabel Cady,
Defendants-Respondents.

No. 23773.

Kansas City Court of Appeals.
Missouri.

Oct. 7, 1963.

ANDREW JACKSON HIGGINS, Special Judge.

Plaintiff-appellant filed a petition to condemn certain lands for Route CC in Livingston County which included a taking of certain right-of-way from defendants-respondents. Condemnation was ordered and commissioners were appointed by the court. Their report found no net damages due defendants. Defendants duly filed their exceptions to the report of commissioners and the case was set down for trial by jury.

Upon trial defendants assumed the burden of proof and were accorded the right to open and close. The petition described the taking as 0.52 acre of new right-of-way, and 1.21 acres for construction and maintenance of a channel change. Defendants' first offer of proof was an unsuccessful request that the court take judicial notice of a sale of a tract report dly contiguous to the tracts in question. The only other evidence offered by defendants was the testimony of their son who was also their attorney. Over objection of plaintiff, he stated that at a time just before the petition was filed the one acre of land which was immediately contiguous or adjacent to the land in question sold at auction for "special purposes" and brought

twenty-one hundred dollars. The witness admitted on cross-examination both in open court and outside the hearing of the jury that he had no personal knowledge of such facts and that any knowledge he had was acquired through hearsay. He also admitted he was not an expert on land values. The numerous timely objections to this offer were eventually sustained. , Upon this state of the record the defendants rested, and, upon motion by plaintiff, the court directed a verdict for the plaintiff. This was accomplished by the giving of instruction No. 1, which is as follows:

> "At the close of the Defendants' evidence, the Court instructs the jury that on the law and the evidence the defendants are not entitled to recover against the plaintiff damages for the taking of their property by the plaintiff; and you will therefore return a verdict in favor of the plaintiff and against the defendants".

Defendants duly filed their Motion for New Trial which was sustained by the court "because of error in giving Instruction No. 1 and further, because the plaintiff has not at any stage of this cause offered proof that plaintiff and defendants were unable to agree upon compensation, if any, for the taking of defendants' land, nor had plaintiff offered any evidence that any negotiations were ever attempted; it being a jurisdictional fact, such fact must not only be pleaded but proven, and the verdict and judgment entered in this cause are hereby set aside." * * * From this order and judgment granting defendants a new trial the plaintiff has appealed.

[1-5] Plaintiff-appellant contends that Instruction No. 1 was proper for the reason that defendants failed to sustain the burden of proving damages as a result of the condemnation. It is true that the landowner has the burden of showing his damages by competent evidence. State ex rel. State Highway Comm. v. Esselman, Mo. App., 179 S.W.2d

749; Cape Girardeau & C. R. Co. v. Bleechle, 234 Mo. 471, 137 S.W. 974. Hence, the trial court properly ordered the hearsay testimony stricken and likewise properly denied the request for judicial notice. This, then, left only the fact of the taking as a basis for submission. Of the existence of this fact there can be no doubt inasmuch as plaintiff clearly represents in its petition that it does thereby acquire certain lands belonging to defendants for a public use. An appropriation of private property from defendants for public use is thus effectively admitted. Article 1, Section 26, of the Missouri Constitution, V.A.M.S., provides in part: "That *private property shall not be taken* or damaged *for public use without just compensation*". (Emphasis supplied.) In view of this constitutional admonition and guarantee we believe that the fact of taking of property owned by defendants constitutes a prima facie case, thus giving rise to a right to have the value of same determined by a jury. Had the jury upon such a submission returned a verdict of no damage we feel the defendants would have no complaint inasmuch as their record provided no evidence tending to prove the dollar value of the damage, if any, occasioned by the admitted taking. By the same token the jury under proper instruction could have found damages within reasonable limits of their own experience and observation in the common affairs of life. Upon this rationale it was error for the court to foreclose defendants from a jury determination by giving Instruction No. 1, and the learned trial judge quite properly reversed himself and granted a new trial.

[6, 7] Appellant next contends that the court erred in granting a new trial for the reason that plaintiff had not offered proof of the parties' inability to agree on compensation or that there had in fact been any negotiations for that purpose. Plaintiff's petition was filed October 1, 1959, and

the court (Honorable James W. Davis) set hearing thereon for December 8, 1959. On that date defendants filed their answer. The important substance of the answer is a denial of the allegation that the parties could not agree on compensation and a further denial that any offer of compensation had been attempted by plaintiff. In this connection defendants prayed that they be discharged for failure of such jurisdictional prerequisites. This prayer was overruled and condemnation was ordered and accomplished. Upon the filing of the report of commissioners defendants again raised their points relative to offer and negotiation and the motion was renewed prior to commencing the trial out of which this appeal arose. On each of these occasions the motion was overruled. Plaintiff's petition alleged that, "Relator cannot agree with the owners of the land, property and rights herein described, upon the proper compensation, if any, to be paid therefor". Insofar as the petition is concerned we hold this to be sufficient averment of such jurisdictional statement. Rule 86, Rules of Civil Procedure, V.A.M.R.: Section 523.010 V.A.M.S. Appellant contends that this is sufficient without further showing to confer jurisdiction on the circuit court relying on Corey v. Chicago, B. & K. C. R. Company, 100 Mo. 282, 13 S.W. 346, l.c. 347, 348, which holds that it is not necessary for the condemning authority to prove inability to agree upon compensation by *oral testimony*. (Emphasis supplied.) Appellant also cites Southern Illinois & M. Bridge Co. v. Stone, 194 Mo. 175, 92 S.W. 475, l.c. 478, where defendants asserted there was no evidence that plaintiff endeavored to agree on compensation. There the court reiterated the holding in Corey, supra, saying that the plaintiff might sustain the averment "by facts and circumstances, of which there was an abundance in this case to show that no efforts, however strenuous, upon the part of the plaintiff, would have resulted in such agreement". We agree with the holdings in

those cases. However, the best service they can perform for plaintiff in the instant case is to indicate that plaintiff's petition conferred jurisdiction on the circuit court in the first instance, i.e., at the time of filing the petition. We cannot overlook the fact, conceded by appellant, that the record before us is void of any proof by testimony, facts and circumstances, or otherwise by which it might be inferred that the averment had at any time been sustained. Inability of the parties to agree upon compensation to be paid is jurisdictional and must be pleaded. State ex rel. State Highway Comm. v. Williams, Mo. App., 69 S.W.2d 970, 971. *It follows that if it is necessary to so plead, then it is necessary to so prove.* (Emphasis supplied.) School District of Clayton v. Kelsey, 355 Mo. 478, 196 S.W.2d 860, l.c. 861. See also to the same effect Caruthersville School Dist. No. 18 of Pemiscot County v. Latshaw, 360 Mo. 1211, 233 S.W.2d 6.

Appellant cites cases on the proposition that there is always a presumption of jurisdiction and right action by a court of general jurisdiction. State ex rel. Nickerson v. Rose, 351 Mo. 1198, 175 S.W.2d 768; Ruckman v. Ruckman, Mo. App., 337 S.W.2d 100; Brinkerhoff-Faris Trust & Savings Company v. Gaskill, 356 Mo. 61, 201 S.W.2d 274. However, in view of the complete lack of proof in this record to sustain the jurisdictional averment in question and in view of defendants' diligence in preserving the point throughout, we are disinclined to indulge this presumption in favor of appellant here. Necessity is the underlying basis for the sovereign's exercise of the power of eminent domain. No such necessity can exist until it be shown that the parties cannot agree in private negotiation. Our landowners should not be haled into court, nor should dockets be burdened with such litigation until it is made to appear affirmatively that negotiations have been attempted and have failed.

Appellant further contends that it is not necessary for the appellant to make an offer of a certain sum of money in order to constitute an attempt to agree, and that the statutory requirement of an attempt to agree could be satisfied by offsetting benefits. This proposition may well be true, but even so, it must be proved when the required statutory allegation is put in issue as it is here.

[81 Accordingly, we rule that not only is it necessary for the condemning authority to allege an inability to agree upon proper compensation to confer jurisdiction for the filing of a petition in condemnation, but that it is equally necessary that such allegation be proven on the record in order that jurisdiction be not thereafter ousted. It follows that on this point also the trial judge properly granted a new trial, and for this additional reason the cause must be remanded, in which case such jurisdictional fact can be accomplished prior to further trial proceedings.

Respondents also raised questions by their answer brief in the form of motions attacking the sufficiency of the statement of jurisdiction, alleging improper statement of facts and lack of jurisdiction. Suffice it to say that we find these motions immaterial and without merit, and we overrule them without discussion inasmuch as we here sustain the trial judge in all relief requested by and granted to respondents.

The order and judgment of the trial court granting defendants a new trial is affirmed, and the cause is remanded for proceedings consistent with this opinion.

All concur.

SPERRY, C., not participating.

SUPREME COURT OF THE STATE OF MISSOURI

Order

October 4, 1961

Now at this day, this cause coming on to be heard, and it appearing to the satisfaction of the court that the appeal herein was taken prematurely, it is considered and adjudged by the court that the appeal be and the same is hereby dismissed without prejudice to the right of defendants-appellants, Elwyn Loomis Cady and Annabel Cady, to proceed with their exceptions. . . .

EXPLANATORY NOTE: It is in reality this Order of the Missouri Supreme Court which appellants desire to be reviewed. In view of the pronouncement of *Martin* v. *Creasy*, 360 U.S. 219, however, appellants proceeded to exhaust state procedure, the final orders being contained in the opinion of the Kansas City Court of Appeals above and the final entry in the Supreme Court of Missouri, as follows:

> "Now on this day, on consideration of appellants' application to transfer the above entitled cause from the Kansas City Court of Appeals, it is ordered that said application be, and the same is hereby denied."
> (April 14, 1966)

APPENDIX B

Constitution of the United States

Art. I * * *

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law im-

pairing the Obligation of Contracts, or grant any Title of Nobility. * * *

Art. IV.

* * *

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States. * * *

Amendment 5.

No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 14.

Section I. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Missouri Revised Statutes

227.120. Commission empowered to purchase or lease lands to exercise right of eminent domain.—The state highway commission shall have power to purchase, lease, or condemn, lands in the name of the state of Missouri for the following purposes when necessary for the proper and economical construction and maintenance of state highways:

(1) Acquiring the right of way for the location, construction, reconstruction, widening, improvement or maintenance of any state highway or any part thereof;

* * *

(13) Acquiring lands for any other purpose necessary for the proper and economical construction of the state highway system for which the commission may have authority granted by law. If condemnation becomes necessary, the commission shall have the power to proceed to condemn such lands in the name of the state of Missouri, in accordance with the provisions of chapter 523, RSMo, insofar as the same is applicable to the said state highway commission, and the court or jury shall take into consideration the benefits to be derived by the owner, as well as the damage sustained thereby. * * *.

Chapter 523

523.010. Lands may be condemned, when—petition—parties.—1. In case land, or other property is sought to be appropriated by any road, railroad, street railway, telephone, telegraph or any electrical corporation organized for the manufacture or transmission of electric current for light, heat or power, including the construction (when that is the case) of necessary dams and appurtenant canals, flumes, tunnels and tailraces and including the erection (when that is the case) of necessary electric steam powerhouses, hydroelectric powerhouses and electric substations or any oil, pipe line or gas corporation engaged in the business of transporting or carrying oil or gas by means of pipes or pipe lines laid underneath the surface of the ground, or other corporation created under the laws of this state for public use, and such corporation and the owners cannot agree upon the proper compensation to be paid, or in the case the owner is incapable of contracting, be unknown, or be a nonresident of the state, such corporation may apply to the circuit court of the county of this state where said land or any part thereof lies, or the judge thereof in vacation, by petition setting forth the general directions in which it is desired to construct their road, railroad,

street railway, telephone, or telegraph line or electric line, including (when that is the case) the construction and maintenance of necessary dams and appurtenant canals, tunnels, flumes and tailraces and when that is the case the appropriation of land submerged by the construction of said dam, and including the erection and maintenance (when that is the case) of necessary electric steam powerhouses, hydroelectric powerhouses and electric substations, or oil, pipe line or gas line over or underneath the surface of such lands, a description of the real estate or other property, which the company seeks to acquire; the names of the owners thereof, if known or if unknown; a pertinent description of the property whose owners are unknown and praying the appointment of three disinterested freeholders, as commissioners, or a jury, to assess the damages which such owners may severally sustain in consequence of the establishment, erection and maintenance of such road, railroad, street railway, telephone, telegraph line, or electrical line including damages from the construction and maintenance of necessary dams and the condemnation of land submerged thereby, and the construction and maintenance of appurtenant canals, flumes, tunnels and tailraces and the erection and maintenance of necessary electric steam powerhouses, hydroelectric powerhouses and electric substations, or oil, pipe line, or gas line over or underneath the surface of such lands; to which petition the owners of any or all as the plaintiff may elect of such parcels as lie within the county or circuit may be made parties defendant by names if the names are known, and by the description of the unknown owners of the land therein described if their names are unknown.

* * *

523.030. Summons; when to issue, how served—publication.—Upon the filing of the petition, a summons shall

be issued, giving such owner at least ten days' notice of the time when said petition will be heard, which summons shall be served by the sheriff of the county, in the same manner as writs of summons are or may be by law required to be served. If the name or residence of the owner is unknown, or if the owners, or any of them, do not reside within the state, notice of the time of hearing the petition, reciting the substance of the petition and the day fixed for the hearing thereof, shall be given by publication once each week for three consecutive weeks prior to the time of hearing the petition, in a newspaper published in the county in which the proceedings are pending, if one is published in the county, or if no newspaper is published in the county, or the publishers shall refuse to publish the same on tender of his usual charges for advertising, then by posting up said notice for three consecutive weeks at the door of the courthouse of the county wherein the lands or any portion of them lie.

* * *

523.040. Appointment of commissioners—their duties. —The court, or judge thereof in vacation, on being satisfied that due notice of the pendency of the petition has been given, shall appoint three disinterested commissioners, who shall be freeholders, resident of the county in which the real estate or a part thereof is situated, to assess the damages which the owners may severally sustain by reason of such appropriation, who, after having viewed the property, shall forthwith return to the clerk of such court, under oath, their report in duplicate, of such assessment of damages, setting forth the amount of damages allowed to the person or persons named as owning or claiming the tract of land condemned, and should more than one tract be condemned in the petition, then the damages allowed to the owner, owners, claimant or claimants of each tract, re-

spectively, shall be stated separately, together with a specific description of the tracts for which such damages are assessed; and the clerk shall file one copy of said report in his office and record the same in the order book of the court, and he shall deliver the other copy, duly certified by him, to the recorder of deeds of the county where the land lies (or to the recorder of deeds of the city of St. Louis, if the land lies in said city) who shall record the same in his office, and index each tract separately as provided in section 59.440, RSMo, and the fee for so recording shall be taxed by the clerk as costs in the proceedings; and thereupon such company shall pay to the said clerk the amount thus assessed for the party in whose favor such damages have been assessed; and on making such payment it shall be lawful for such company to hold the interest in the property so appropriated for the uses aforesaid; and upon failure to pay the assessment, aforesaid, the court may, upon motion and notice by the party entitled to such damages, enforce the payment of the same by execution, unless the said company shall, within ten days from the return of such assessment, elect to abandon the proposed appropriation of any parcel of land, by an instrument in writing to that effect, to be filed with the clerk of said court, and entered on the minutes of the court, and as to so much as is thus abandoned, the assessment of damages shall be void.

* * *

523.050. Commissioners' report—notice of filing—review.—1. Upon the filing of such report of said commissioners, the clerk of the court wherein the same is filed shall duly notify the party whose property is affected of the filing thereof; and the report of said commissioners may be reviewed by the court in which the proceedings are had, on written exceptions, filed by either party in the

clerk's office, within ten days after the service of the notice aforesaid; and the court shall make such order therein as right and justice may require, and may order a new appraisement, upon good cause shown.

2. Such new appraisement shall, at the request of either party, be made by a jury, under the supervision of the court, as in ordinary cases of inquiry of damages; but notwithstanding such exceptions, such company may proceed to erect said telephone or telegraph line, or construct said road or railroad; and any subsequent proceedings shall only affect the amount of compensation to be allowed. In all cases arising under the provisions of this chapter, the report of commissioners, when signed by a majority of them, shall be taken and considered as the report of all.

* * *

523.055. Possession of land delivered, when, notice—writ of possession, executed how.— In any action to condemn lands under the power of eminent domain, where the condemnor has paid into the office of the clerk of the circuit court the amount of damages assessed by commissioners pursuant to law, the circuit clerk shall give the owners or those in possession written notice of such fact within five days. If the owners or those in possession do not deliver possession of the property condemned within ten days after the receipt of notice of the payment of the award, then on the request of the condemnor the court shall issue a writ of possession directing the sheriff to deliver the possession of such property to the condemnor forthwith; except that the court may upon the motion of said owners grant them such extension of time, not to exceed ninety days, as the court finds to be reasonable under all the circumstances. The writ of possession shall be executed in the manner provided by law for the execution of writs of possession in ejectment suits for the recovery of land. If a writ of pos-

session is issued or a motion filed asking for an extension by said owners, then all costs accrued in executing the writ and in the hearing of the motion may be assessed against the said owners.

523.060. Right of trial by jury in condemnation proceedings.— Any plaintiff or defendant, individual or corporate, shall have the right of trial by jury of twelve persons, if either party file exceptions to the award of commissioners in any condemnation case.

* * *

523.070. Costs, by whom paid.— The cost of the proceeding to appropriate the right of way shall be paid by the company seeking the appropriation, up to and including the filing and copying of the report of the commissioners; and the court, as to any costs made by subsequent litigation, may make such order as in its discretion may be deemed just. The court shall allow the commissioners a reasonable compensation for their services, which shall be taxed as costs in the proceedings.

* * *

Missouri Rules of Civil Procedure

86 CONDEMNATION PROCEEDINGS

86.04 Petition—Contents

The petition shall contain a description of the property or right which the plaintiff desires to acquire, use, or extinguish; if a dam is to be constructed across any watercourse, the petition shall contain the name of the watercourse, a description of the point at which it is desired to erect such dam and a description of any installations which it is proposed to erect in connection with the dam; the names of the owners of the property to be condemned, if known, or, if unknown, a statement that they are unknown; a state-

ment of the foundation of the plaintiff's right to condemn the property involved in the condemnation proceedings; a general statement of the nature of the business, improvement or use for which the property is to be taken; a statement either that the condemner or owner can not agree on the proper compensation to be paid or that an owner is incapable of contracting, is unknown, can not be found or is a non-resident of the state; if any right of way be sought, the location and general route thereof shall be described and a copy of the construction plans required by Section 227.050 of the Revised Statutes of Missouri, 1949, shall be filed in the circuit clerk's office and made a part of each condemnation petition by reference; when property will be benefited by an improvement in connection with which condemnation proceedings are brought, a map of the benefit district involved, and a copy of any local legislation establishing the district shall be filed with the petition and made a part thereof; a prayer for the appointment of three disinterested freeholders, as commissioners, to assess the damages which such owners may severally sustain because of the condemnation of the property, and the use to which it is to be put and to assess benefits in those instances in which it is proper to make such assessments.

* * *

86.05 Summons, When to Issue, How Served—Publication, When

Upon the filing of the petition, a summons shall be issued giving the owners of the property involved at least ten days' notice of the time and place when said petition shall be heard, which summons shall be served in the manner provided for by these rules in ordinary civil cases. If the name, residence, or whereabouts of any of the owners be unknown, or if any of the owners do not reside within the state or for any other reason personal service cannot

be had on them within the state, notice of time and place of hearing of the petition shall be given by publication for three weeks consecutively, prior to the time of the hearing of the petition, in a newspaper published in the county in which the proceedings are pending, if one is published in said county, or, if no newspaper is published in the county, or the publishers shall refuse to publish the same, then by posting said notice for three consecutive weeks at the door of the courthouse of the county wherein the lands or any portion of them lie.

* * *

86.06 Appointment of Commissioners—Duties of—Standard for Damages

The court, or judge thereof in vacation, on being satisfied that due notice of the pendency of the petition has been given, shall appoint three disinterested commissioners, who shall be freeholders, resident of the county in which the real estate or a part thereof is situated, to assess the damages which the owners may severally sustain by reason of such appropriation. The value of the property being condemned and all benefits and damages shall be assessed by said commissioners as of the date the assessment is made, and, if the award of said commissioners has not been paid to the defendants, or to the clerk of the court for said defendants, within one year after said commissioners' award is filed, any subsequent assessment of values, benefits and damages shall be as of the date of such subsequent assessment. Said commissioners, after having viewed the property, shall forthwith return, under oath, to the clerk of such court their report in duplicate setting forth, and stating separately as to all property held under the same ownership, (1) the amount of net damages, if any, together with (2) a separate description of the property for which the damages are assessed, and the clerk shall file one

of said copies in his office and cause the other to be delivered to the recorder for the county where the property lies, who shall record the same in his office and shall enter in the abstract and index of deeds at the proper place in the grantor's column the respective names of the first persons alleged to claim, or through whom is claimed some title to each of such respective separately described properties, and the fee for said recording shall be taxed by the clerk as costs of the proceedings. When condemnation proceedings are brought in connection with a project to supply water to any city, town or village, the commissioners or jury shall inquire, and make report as to the value of the use of the stream, or the diversion of the waters thereof, to the extent to which the plaintiff proposes to use it, or to divert them, or what damage will be done by the erection and maintenance of any dam or buildings which it is proposed to erect and maintain in connection with aforesaid supplying of water, specifically stating to whom and upon what account damages are awarded. When private property is appropriated by a municipality for any public place or use, resulting benefits shall be assessed against the municipality for the amount of the benefit to the public generally and the balance of the benefits shall be assessed against the owner or owners having land within the benefit limits set by the municipality, which land shall be especially benefited by the proposed improvement, to the proportion that each lot of said owners shall be benefited. Upon making payment to the clerk of the amount assessed, for the party or parties in whose favor such damages have been assessed, it shall be lawful for the condemner to take possession and hold the interest in the property so appropriated for the uses aforesaid; and, upon failure to pay the assessment aforesaid within ten days after it becomes final, or, in the case of a municipality, within thirty days thereafter, the court may, upon motion and notice by the party en-

titled to such damages, enforce the payment of the same by execution, unless the condemner shall, within said ten or thirty day period, elect to abandon the proposed appropriation of any property, by an instrument in writing to that effect, to be filed with the clerk of such court, and entered on the minutes of the court, and to so much as is thus abandoned the assessment of damages shall be void. If such appropriation be so abandoned as to any property, proceedings for the condemnation of the same property shall not be instituted again within two years after such abandonment. The report of the commissioners, when signed by two of said commissioners, shall be taken and considered as the report of all.

* * *

86.08 Clerk to Give Notice of Filing Report—Exceptions to Report, When Filed, Effect

Immediately after the filing of the report of the commissioners, the clerk of the court wherein it is filed shall notify the parties of such filing. Said notice shall be given, if possible, in the manner provided by Rule 43.01, or, if this is not possible, by posting said notice in the office of said clerk of the court. Said clerk shall file in said cause his certificate and any other lawful evidence necessary to prove the time and manner of serving all such notices. Any party may file written exceptions to the report of the commissioners within ten days after the service or posting of the notice aforesaid. Upon the filing of such exceptions, the issue of the amount of damages sustained by, and benefits accruing to, the defendant's property, if any, as a result of the appropriation, shall be submitted to a jury, or, if a jury be waived, to the court, to be tried as in ordinary cases of inquiry of damages. On such trial, the court or jury, within the direction of the court, may view the property involved. Notwithstanding said exceptions, the con-

demner may, after paying the amount of the commissioners' award to said clerk of the court for the owner or owners of any property involved, take possession of the property or subject it to the public use set out in the condemnation petition, and any subsequent proceedings shall only affect the amount or division of the compensation allowed.

* * *

86.09 Costs, by Whom Paid

The cost of the condemnation proceeding shall be paid by the condemner, up to and including the filing and copying of the report of the commissioners; and the court, as to any costs made by subsequent litigation, may make such order as in its discretion may be deemed just. The court shall allow the commissioners a reasonable compensation for their services, which shall be taxed as costs in the proceedings.

* * *

APPENDIX C

Points Briefed in Missouri Courts

IN THE
SUPREME COURT OF MISSOURI
DIVISION No. 2
SEPTEMBER SESSION, 1961

STATE ex rel. STATE HIGHWAY COMMISSION,
Respondent,
vs.
ELWYN LOOMIS CADY, et al.,
Appellants.

No. 48,175

APPEAL FROM THE CIRCUIT COURT OF LIVINGSTON COUNTY, MISSOURI, AT CHILLICOTHE
(HON. JAMES W. DAVIS, JUDGE)

APPELLANTS' BRIEF

* * *

Argument

I. The court erred in overruling defendants' prayer to be discharged because of a failure of proof of an indispensable jurisdictional fact, viz., that the parties were unable to agree on a proper monetary compensation for land to be taken before the condemnation petition was filed.

II. Procedure adopted whereby commissioners were not required to, and in fact did not, determine monetary compensation under the statute amounted to an illegal and unconstitutional taking of defendants' property and amounted to the issuance of bills of credit by commissioners, all in violation of Missouri and United States constitutions.

IN THE

SUPREME COURT OF MISSOURI

DIVISION No. 1

APRIL SESSION, 1965

STATE ex rel. STATE HIGHWAY COMMISSION,
Respondent,
vs.
ELWYN LOOMIS CADY, et al.,
Appellants.

No. 50,905

APPEAL FROM THE CIRCUIT COURT OF LIVINGSTON COUNTY, MISSOURI, AT CHILLICOTHE

(HON. J. P. MORGAN, JUDGE)

APPELLANTS' BRIEF

* * *

Argument

I. The Court erred in overruling defendants' prayers to be discharged and motions to dismiss because of a failure of proof of an indispensable jurisdictional fact, viz., that the parties were unable to agree on a proper monetary compensation for land to be taken before the condemnation petition was filed.

II. The Court erred in not setting aside the report of commissioners inasmuch as the report made no provision for payment of just and full compensation in money so that the procedure adopted amounted to an illegal and unconstitutional taking of defendants' property and amounted to the issuance of bills of credit by commissioners, all in violation of Missouri and United States constitutions.

III. The Court erred in permitting the issue of special damages to be injected into the inquiry of damages before the jury on opening statement.

IV. The Court erred in overruling defendants' motion for new trial since the verdict was contrary to all the evidence and directly contrary to the single verdict-directing instruction given.

APPELLANTS' REPLY BRIEF

* * *

COUNTERPOINT I.

MONEY COMPENSATION IS CONSTITUTIONALLY REQUIRED.

COUNTERPOINT II.

BILLS OF CREDIT PROHIBITION IS FUNDAMENTAL, NOT OBNOXIOUS PRATTLE.